APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 584—September Term, 1971.

(Argued March 24, 1972 Decided April 26, 1972.)

Docket No. 71-2185

UNITED STATES *ex rel.* STEPHEN RADICH,

Petitioner-Appellant,

against

THE CRIMINAL COURT OF THE CITY OF NEW YORK; HON. DAVID ROSS, Administrative Judge of the Criminal Court of the City of New York; FRANK S. HOGAN, District Attorney, New York County; and GEORGE F. MCGRATH, New York City Commissioner of Correction,

Respondents-Appellees.

Before:

HAYS, MANSFIELD and MULLIGAN,

Circuit Judges.

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Appendix A

MULLIGAN, *Circuit Judge* (dissenting):

Stephen Radich, the petitioner herein, is an art dealer convicted in the Criminal Court of the City of New York of casting contempt on the American flag in violation of what was then § 1425(16)(d) of the New York Penal Law by virtue of his display of "new art" forms described in the majority opinion. From the beginning Radich has been represented by able counsel of the American Civil Liberties Union who questioned the constitutionality of the statute under which he was convicted. He was found guilty in a two-to-one decsion of the Criminal Court (*People* v. *Radich*, 53 Misc. 2d 717 (1968)) with opinions by both the majority and dissent. The Appellate Term of the Supreme Court, First Department affirmed unanimously without opinion. (*People* v. *Radich*, 57 Misc. 2d 1082 (1968)). A divided New York Court of Appeals (5-2) affirmed the conviction with majority and dissenting opinions. *People* v. *Radich*, 26 N.Y.2d 114 (1970). The Supreme Court granted review on October 19, 1970 to consider the same constitutional issues which are now pre-

sented to the Federal District Court. (See *Radich* v. *New York*, 39 U.S.L.W. 3161). On February 22, 1971 the issues were argued before the Supreme Court and on March 24, 1971 the United States Supreme Court rendered its decision:

> "PER CURIAM.
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> "The Judgment is affirmed by an equally divided Court.
> "MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case."

Radich v. *New York*, 401 U.S. 531. Although the Supreme Court said it affirmed the judgment of the New York Court of Appeals, the majority opinion here reaches the conclusion that the Court made no actual adjudication at all because a majority could not reach any decision on the merits and that petitioner, whose petition for rehearing was denied on May 7, 1971 (402 U.S. 989), is now free to again urge these very issues in a *habeas corpus* petition in the United States District Court for the Southern District of New York. I cannot subscribe to this view.

Whatever the law before 1966, it is now evident that we are called upon to construe Title 28 U.S.C. § 2244(c), the purpose of which was "to provide a qualified application of the doctrine of *res judicata* . . . to proceedings on applications for *habeas corpus* by state prisoners." H.R. Rep. No. 1892, 89th Cong., 2d Sess. 3, 8, 13 (1966).[1]

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[1] It is interesting to note that the only case in point, *United States ex rel. Biggers* v. *Neil*, 448 F.2d 91 (6th Cir. 1971), *cert. granted*, —— U.S. ——, 40 U.S.L.W. 3410 (Feb. 2, 1972) does not discuss or even cite in either the majority or dissenting opinions, the governing statute § 2244(c). The majority opinion is based upon pre-statutory case law evolving before the *res judicata* bar enacted by Congress in 1966. It is in accord with the majority here but in view of its failure to construe the statute, I cannot find it convincing and certainly not persuasive.

The subsection which is set forth in full in footnote 3 of the majority opinion, in essence makes a prior judgment of the Supreme Court conclusive as to all issues of fact or law in a state prisoner's federal *habeas corpus* proceeding, where these issues have been actually adjudicated by the Supreme Court.[2]

Our inquiry therefore is what did the Congress intend by the phrase "actually adjudicated." The Senate Report which provides the legislative history of the subsection states: "This subsection is intended to give a conclusive presumption only to actual adjudications of federal rights by the Supreme Court, and *not to give such a presumption to mere denials of writs of certiorari.*" Sen. Rep. No. 1797, 89th Cong., 2d Sess., in 1966 U.S. Code, Cong. & Ad. News 3663, 3664.[3] (Emphasis added)

The majority opinion takes the position that an affirmance of a state court judgment by an equally divided court has "no more legal significance for *habeas* purposes than denial of *certiorari*, which has never precluded subsequent collateral relief. *Brown* v. *Allen*, *supra*, at 456, 458-59, 489-94 (1953)." *Brown* v. *Allen*, 344 U.S. 443 (1953) does not deal with or even mention affirmances by an equally divided bench but rather is concerned with mere

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[2] There is no question of fact here but rather legal issues of the constitutionality of § 1425(16)(d) of the Penal Law of New York under which the defendant was convicted. All of these issues were as pointed out above before the Supreme Court.

[3] "It is clear that 'actually adjudicated' questions of law include *all* dispositions except denials of certiorari" Developments in the Law—Habeas Corpus, 83 Harv. L. Rev. 1038, 1152 (1970) (emphasis added and footnote omitted). See also 45 Texas L. Rev. 592, 595 n. 27 (1967).

denials of writs of certiorari.[4] Moreover, Mr. Justice Frankfurter's reasoning in finding that a mere denial of a writ of certiorari by the Supreme Court in a state prisoner case did not bar a subsequent *habeas corpus* application is most illuminating. In his opinion for the court on this point he stated:

> "These petitions for certiorari are rarely drawn by lawyers; some are almost unintelligible and certainly do not present a clear statement of issues necessary for our understanding, in view of the pressure of the Court's work. The certified records we have in the run of certiorari cases to assist understanding are almost unknown in this field. Indeed, the number of cases in which most of the papers necessary to prove what happened in the State proceedings are not filed is striking. Whether there has been an adjudica-

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[4] It should be noted that § 2244(c) refers to a prior judgment of the Supreme Court "on an appeal or by a writ of certiorari". The dismissal of a writ may nonetheless have *res judicata* effect if the circumstances reveal that the court has dismissed on the merits, see *Duncan* v. *Carter*, 299 F.2d 179 (9th Cir.), *cert. denied*, 370 U.S. 952 (1962). In that case a defendant's criminal conviction had been affirmed by the California Supreme Court. The United States Supreme Court initially granted certiorari, but after oral argument on the merits, it dismissed the writ with a brief statement: "the totality of circumstances disclosed fails to support the substantial due process issues tendered in the petitions for certiorari. . . ." *Baldonado* v. *California*, 366 U.S. 417 (1961). The defendant then commenced a federal habeas corpus action, raising the same constitutional issues that she had placed before the Supreme Court. In affirming the district court's refusal to grant the writ, a panel of the Ninth Circuit concluded that the Supreme Court had "actually adjudicated" these claims and hence it was bound to follow that Court's decision. Although this case was decided prior to the enactment of § 2244(c), were the same question to be presented today, habeas corpus relief would be barred under the present statute. Compare *Miller* v. *Carter*, 434 F.2d 824, 826 (9th Cir. 1970), *cert. denied*, 402 U.S. 972 (1971).

tion or simply a perfunctory denial of a claim below is rarely ascertainable. Seldom do we have enough on which to base a solid conclusion as to the adequacy of the State adjudication. Even if we are told something about a trial of the claims the applicant asserts, we almost never have a transcript of these proceedings to assist us in determining whether the trial was adequate. Equally unsatisfactory as a means of evaluating the State proceedings is the filing of opinions; in less than one-fourth of the cases is more than a perfunctory order of the State courts filed. We would have to have very different records and to alter our consideration of these cases radically if a denial could fairly be deemed to be an undisclosed decision on the merits. In a few cases the issues before the District Court had not even been raised here. In other cases, the emphasis put on the issues here differed considerably from that put on them in the District Courts. Alice could understand, but not I, how under such circumstances a district judge could assume if he is so minded that we 'decided' the question now presented to him." *Brown* v. *Allen, supra,* 344 U.S. at 493-94 (footnotes omitted).

None of the obfuscations and inadequacies surrounding the denial of the writ of certiorari which led Mr. Justice Frankfurter to deny them significance for habeas purposes are present here. Mr. Radich is not an illiterate inmate of a New York State prison—he hasn't spent any time in custody since his 1968 conviction. He has always been represented by competent counsel who have clearly presented his constitutional arguments to the State courts and the United States Supreme Court. There was an ample record from the State courts with written opinions artic-

ulating clearly the majority and dissenting positions. There has been nothing peremptory or perfunctory in the disposition by the Supreme Court which heard argument on the merits and which voted on the merits. Radich even petitioned for reargument and lost. He has had his day in the Supreme Court and more. He failed to persuade a majority of the justices that the statute was unconstitutional and therefore lost.[a]

There is nothing startling in the proposition that an even vote constitutes an affirmance of the judgment appealed. This has long been held and never challenged. While a 4-4 affirmance does not become a binding precedent, the law of the case has been fixed. Thus the Supreme Court held in *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1868) "The judgment is as conclusive and binding upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case." In *United States* v. *Pink*, 315 U.S. 203, 216 (1942) Mr. Justice Douglas stated that a 4-4 affirmance is "conclusive and binding upon the parties as respects that controversy." In *Hertz* v. *Woodman*, 218 U.S. 205 (1910) the Supreme Court said at pages 213-14:

> "Under the precedents of this court, and as seems justified by reason as well as by authority, an affirmance by an equally divided court is as between the parties a conclusive determination and *adjudication* of the matter adjudged, but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an

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[a] *Fay* v. *Noia*, 372 U.S. 391, 424 (1963) relied upon by the majority requires that federal constitutional rights of personal liberty "shall not be denied without the fullest opportunity for plenary federal judicial review." The record before us establishes in my view that the petitioner here assuredly had that opportunity.

authority for the determination *of other cases*, either in this or in inferior courts."* (Emphasis added)

The majority's argument that since there was equal division there was no decision on the merits and therefore no adjudication under the statute is not only without authority but is of course *petitio principii*. The fact that no opinion is written is obviously unimportant. If the court had simply stated that the judgment is affirmed 5 to 3 that would constitute an adjudication by the Supreme Court. Here the court said "The judgment is affirmed by an equally divided Court." This is an adjudication. The court said so and I believe we should take it at its word.

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* Mr. Justice Brennan's statement in *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 264 (1960) that "nothing is settled" by an equally divided court, as I read it, refers not to its lack of finality as to the parties before the court, but rather that it does not settle the law and has no precedential value. It is an adjudication *ex necessitate sed ex lege*.

APPENDIX B

40 CINCINNATI LAW REVIEW 883-891 (1971)

HABEAS CORPUS—RES JUDICATA—A PREVIOUS AFFIRMATIVE OF PETITIONER'S STATE COURT CONVICTION BY AN EQUALLY DIVIDED SUPREME COURT DOES NOT BAR A REVIEW OF THE CONVICTION IN A FEDERAL HABEAS CORPUS PROCEEDING.—*Biggers v. Neil*, 448 F.2d 91 (6th Cir. 1971).

After a trial by jury in a Tennessee State court, Archie Biggers was convicted of rape and sentenced to a term of twenty years. Biggers' conviction was based on evidence from a pretrial identification of his voice by the victim of the rape, some seven months after the crime's commission. The identification procedure was a showup,[1] in which the police presented to the complaining witness a single suspect

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[47] *See id.* at 1024.

[1] The showup procedure should be contrasted with the more familiar lineup in which the witness must identify the culprit from a group of people, thus forcing the witness to be more selective in his identification.

for identification. During the showup at the station house, Biggers was compelled to repeat the words spoken by the rapist the night of the crime. At this confrontation between Biggers and the prosecutrix, he was neither assisted by counsel nor offered an opportunity for such assistance. The Supreme Court of Tennessee subsequently affirmed the conviction, holding that Biggers' fifth amendment right against self-incrimination had not been violated.[3] On certiorari to the United States Supreme Court,[4] Biggers' petition presented the question of whether the voice identification had violated his right of due process.[5] The judgment of the State court was affirmed per curiam by an equally divided Court,[6] with Mr. Justice Douglas dissenting in the only full, written opinion.

In a collateral attack on the judgment, Biggers obtained a writ of habeas corpus after a full hearing and review before the United States District Court for the Middle District of Tennessee. The district court found that the circumstances of the case were not so urgent as to warrant the use of the showup procedure. Since the police could have arranged the more reliable lineup type of procedure, the court concluded that the use of evidence from the showup, which tended to maximize the chances for misidentification, denied Biggers due process of law. On appeal to the Court of Appeals for the Sixth Circuit, *held:* Affirmed.[8] The district court decided a different question from the one presented to the Supreme Court and, in any case, the affirmance by an equally divided Court did not constitute a federal adjudication of Biggers' constitutional claims: therefore the district court was not precluded from entertaining the petition for a writ of federal habeas corpus in respect to the pretrial identification procedure.[7]

Historically, the power of the federal courts to issue writs of habeas corpus was possible only by specific grants of such jurisdiction by Congress.[8] Since the Constitution simply provides that neither Congress nor the executive branch shall suspend the writ of habeas corpus except in the case of a rebellion or an invasion,[9] it was left to the legislature to delineate the scope of the writ by statutory

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[3] Biggers v. State, 219 Tenn. 555, 411 S.W.2d 696 (1967).

[4] Biggers v. Tennessee, 390 U.S. 404, *reh. denied*, 390 U.S. 1037 (1968).

[5] Although the Supreme Court had held in United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967) that the accused must be given the opportunity for assistance by counsel during a lineup, the requirement was not given a retroactive effect, and thus Biggers' lack of counsel at the showup was not in itself a denial of federal rights.

[6] 390 U.S. 404. For the Supreme Court's policy in granting rehearings after an equally divided decision refer to R. Stern & E. Gressman, Supreme Court Practice 522-24 (4th ed. 1969).

[7] Biggers v. Neil, 448 F.2d 91 (6th Cir. 1971).

[8] *Id.*

[9] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807). *But see* Paschal, *The Constitution and Habeas Corpus*, 1970 Duke L.J. 605.

[9] U.S. Const. art. I, § 9, cl. 2.

enactment. The Judiciary Act of 1789[10] supplied the federal courts with habeas jurisdiction to examine the legality of a prisoner's detention who was then "in custody, under or by colour of the authority of the United States."[11] The writ did not extend to persons in custody by authority of a state.[12] Not until the Habeas Corpus Act of 1867[13] did the federal courts' habeas jurisdiction extend to state prisoners.

From 1867 to 1952 the habeas jurisdiction of the federal courts was carefully limited in respect to state prisoners. The availability of the writ to state prisoners was first based on a jurisdictional concept.[14] For example, where a prisoner's conviction rested upon an unconstitutional statute, the judgment was void for lack of jurisdiction and thus open to collateral attack.[15] The scope of the writ was restricted to the question of whether the state court had acted within its authority and not whether error of fact or law had been committed in the state proceedings.[16] If the state court acted with proper jurisdiction, the due process requirement of the fourteenth amendment was duly satisfied.[17]

Defining the law of federal habeas corpus as of 1915, the Supreme Court in *Frank v. Mangum*[18] held that the writ was not available to a state prisoner, convicted by a court of competent jurisdiction, where his claim of denial of federal rights had been given an adequate review by the state judicial process.[19] However, eight years later, in *Moore v. Dempsey*,[20] the Court indicated that the adequacy of the state processes did not necessarily prohibit a redetermination of a valid federal question which affects the finding of guilt. The decision marked a shifting in the Court's focus from deference to state court adjudications to the expansion of due process rights for the individual.[21]

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[10] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

[11] *Id.* at 82.

[12] *Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845).

[13] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (codified at 28 U.S.C. § 2241 (1964)). *See also* Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965).

[14] The Supreme Court further required the habeas petitioner to exhaust his state remedies before a federal court would consider his application. *Ex parte* Royall, 117 U.S. 241 (1896).

[15] *See id.* at 248.

[16] *See, e.g., In re* Wood, 140 U.S. 278 (1891).

[17] *In re* Converse, 137 U.S. 624 (1891).

[18] 237 U.S. 39 (1915).

[19] *Id.*

[20] 261 U.S. 86 (1923).

[21] For a discussion of the effect of *Moore* on the *Frank* decision and whether the cases can be reconciled, refer to Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 478-92 (1963); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1328-30 (1961); Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1050-54 (1970).

In 1953 any ambiguity in the law of federal habeas corpus with respect to state prisoners was resolved by the Supreme Court in *Brown v. Allen*.[23] That case held that a state prisoner could have his federal constitutional claims fully litigated in a federal court although these same claims had been rejected on the merits by the state court.[23] Subsequent decisions have asserted the principle that "...conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[24]

In *Biggers*,[25] the court relied on the broad notion that res judicata does not apply to federal habeas corpus proceedings as a justification for its inquiry into the petitioner's conviction despite the affirmance by the Supreme Court. Notably the court did not discuss, in this regard, the application of Title 28, Section 2244(c) of the United States Code.[26] This section provides that in a federal habeas corpus proceeding a prior judgment by the Supreme Court on direct review is conclusive as to all issues of law or fact "actually adjudicated" by the Court.[27] The only stated exception to this rule is where the habeas petitioner demonstrates the existence of a "material and controlling fact" not in the record before the Supreme Court.[28] The legislative intent of this section was "for a qualified application of the doctrine of res judicata."[29] Contrary to the majority opinion of

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[23] 344 U.S. 443 (1953).

[23] One possible reason for this expansion of federal habeas corpus was that "with the growth of the country and the attendant increase in the Court's business, it could no longer perform its historic function of correcting constitutional error in criminal cases by review of judgments of state courts and had to summon the inferior federal judges to its aid." Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 155 (1970).

[24] Fay v. Noia, 372 U.S. 391, 424 (1963).

[25] 458 F.2d 91.

[26] 28 U.S.C. § 2244(c) (Supp. IV, 1969), *amending* 28 U.S.C. § 2244 (1964):

> In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State Court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State Court, shall be conclusive as to all issues of fact or law . . . actually adjudicated by the Supreme Court therein, unless the applicant . . . shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

[27] *Id.*

[28] *Id.*

[29] S. REP. No. 1797, 89th Cong., 2d Sess., 1966 U.S. CODE CONG. & AD. NEWS 3663, 3664. The Habeas Corpus Committee, which recommended these amendments, was composed of federal judges who considered these recommendations to be consistent with recent Supreme Court rulings on habeas corpus. The judges felt they were bound to follow these decisions.

the court of appeals, this provision of the Code emphasizes that res judicata has not been completely jettisoned in federal habeas jurisdiction.

The purpose and scope of section 2244(c) is consistent with previous Supreme Court rulings on habeas corpus.[30] Where a constitutional claim has received plenary review in the state courts, a federal habeas corpus proceeding to relitigate this claim has been justified on the grounds that a state prisoner is entitled to a *federal* review of his constitutional rights.[31] If the Supreme Court has given a state prisoner such a review on direct appeal, then the lower federal courts are justified in denying him a writ of habeas corpus to relitigate the same issue.

For res judicata to apply in any case, the issue in question must have been resolved in an earlier decision. In *Biggers* the court attempted to distinguish the issues before the Supreme Court and the district court as an alternate basis for affirming the grant of habeas corpus. The court concluded that the Supreme Court's review was limited to the question in the application for certiorari; that is, whether the failure to provide counsel or to arrange a lineup resulted in an unfair identification of Biggers' voice which violated his right of due process.[32] The court of appeals insisted that they were determining the constitutionality of the showup procedure as used in this case, and were not reaching the narrower issue of the voice identification as presented to the Supreme Court.

In its discretion, the Supreme Court does limit the review on certiorari to the questions in the application.[33] As the dissenting judge noted in *Biggers*, however, the petitioner admitted to the court of appeals that the Supreme Court had reviewed the broad questions of due process in relation to the "totality of circumstances" concerning the identification procedure. The dissent also noted that the petitioner had presented such questions in his brief before the Supreme Court. The majority dismissed this fact, asserting that a brief cannot expand the scope of the Court's consideration. However,

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[30] *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963); Sanders v. United States, 373 U.S. 1 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

[31] Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 106-07 (1959).

[32] The exact question upon which the Supreme Court granted certiorari was:

> The petitioner, a 16 year-old Negro boy, was compelled by the police, while alone in their custody at the police station, to speak the words spoken by a rapist during the offense almost eight months earlier for voice identification by the prosecutrix.
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> Was the denial of petitioner's right to personal dignity and integrity by the police, and the failure to give him benefit of counsel, provide him with a line-up, or with any other means to assure an objective, impartial identification of his voice by the prosecutrix a violation of petitioner's Fifth, Sixth and Fourteenth Amendment rights?

488 F.2d at 96.

[33] REV. R. SUP. CT. 23(1)(c).

Rule 40(1)(d)(2) of the Supreme Court's Revised Rules[34] states that the questions in petitioner's brief may be differently phrased and will be reviewed where these questions are not substantially different from those presented in the application. Assuming for the moment that the petition presented only the narrow issue of voice identification, Rule 40(1)(d)(2) at least indicates that the Supreme Court's review is not inflexibly riveted to the exact wording of a petition as the majority suggested.

Actually, the petition for certiorari specifically stated that Biggers was alone before the prosecutrix during the identification, that the police failed to provide a lineup, and that there was a seven month interval between the crime and the identification.[35] The majority in *Biggers* held that the petition did not question the constitutionality of the showup procedure and was limited solely to the voice identification issue. On the contrary, the facts presented in the petition clearly indicate that the entire identification procedure was put in issue. Curiously, these same facts were used by the district court as grounds for deciding that the showup procedure violated due process. The distinction drawn by the majority in *Biggers* between the issue decided by the district court and the issue they say was before the Supreme Court is more semantic than substantive. It demonstrates an attempt to artificially narrow the question presented on certiorari.

Although Mr. Justice Douglas treated the broad question of due process raised by the facts, the court in *Biggers* reasoned that his opinion only reflected the consideration of the four dissenters. Pursuing this line of reasoning, the circuit court concluded that the four Justices who voted for affirmance without recording their opinions may have considered only whether the voice identification in itself was a denial of due process. Such a conclusion is simply not supported by the facts.

Assuming that the issues before the Supreme Court and the district court were the same;[36] the crucial question, then, is whether the affirmance by an equally divided Court was a decision on the merits. Where the Supreme Court has adjudicated a federal question, raised in a direct appeal from a state court judgment, the res judicata doctrine of section 2244(c) will bar federal habeas relief. The majority in *Biggers* reasoned that the Supreme Court's affirmance was purely

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[34] Rev. R. Sup. Ct. 40(1)(d)(2):

> The phrasing of the questions presented need not be identical with that set forth in the . . . petition for certiorari, but the brief may not raise additional questions or change the *substance* of the questions already presented in those documents. (Emphasis added.)

[35] *See* note 32 *supra*.

[36] This assumption was also made—at least implicitly—by the court of appeals in respect to their discussion of the applicability of res judicata and the effect of the equally divided decision of the Supreme Court. The question of res judicata and the effect of an equally divided Court are important only if the issues were the same before both courts.

technical since the Court could only affirm where there was no majority to reverse. The authorities which the court cited in support of this contention more forcefully hold, as argued by the dissenting judge, that an equally split decision does not settle any principle of law and hence the case lacks precedential value.[37] As an indication of an evenly split decision's lack of precedential value, the Court ordinarily does not write an opinion.

> The usual practice of not expressing opinions upon equal division has the salutary force of preventing the identification of the Justices holding the differing views as to the issue, and this may well enable the next case presenting it to be approached with less commitment.[38]

In previous Supreme Court cases involving or interpreting the result of an equally divided vote of the Court,[39] it was emphasized that the judgment of the evenly split Court, though not an authority for subsequent cases, was a conclusive and binding decision upon the parties involved. Furthermore, in two other cases[40] explaining the effect of a decision by an equally divided Court, there is language which suggests that such a decision is definitely a disposition on the merits. In any case where a party appeals to the Supreme Court, he has the burden of convincing a majority of the Court. Consequently, if he fails to carry his burden, he loses on the merits. In Biggers' appeal before the Supreme Court, he was given a complete review of his constitutional claim, and the Justices did vote on the merits of the case. While the Court had to affirm, since a majority vote is needed to reverse, it was nonetheless upon a full hearing of the merits. In this particular situation, the wisdom is questionable which would allow

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[37] Anderson v. Johnson, 390 U.S. 456 (1968); Durant v. Essex Co., 74 U.S. (7 Wall.) 107, 113 (1868); Etting v. United States Bank, 24 U.S. (11 Wheat.) 59, 78 (1826). The dissent cited: United States v. Pink, 315 U.S. 203, 216 (1942); Hertz v. Woodman, 218 U.S. 205, 213-14 (1910); United States v. Worrall, 2 U.S. (2 Dall.) 384 (1798).

Etting v. United States Bank and *Durant v. Essex Co.*, cited by the majority as explaining the effects of an equally divided decision, are civil cases. Since the *Biggers* case involved a state prisoner's claimed denial of constitutional rights, there would be a strong policy consideration to strictly interpret the res judicata effect of an equally divided decision. However, the court of appeals did not articulate this consideration since they were able to interpret these civil cases as holding that an equally divided decision does not reach the merits.

In the one criminal case cited by the majority, *Anderson v. Johnson*, the per curiam opinion merely stated that the lower court's decision would remain in effect. This language is explained by the fact that none of the eight Justices voted for affirmance—four voted for reversal and four voted to dismiss the writ as improvidently granted.

[38] Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 264 (1960).

[39] *See* United States v. Pink, 315 U.S. 203, 216 (1942); Hertz v. Woodman, 218 U.S. 205, 213-14 (1910); Durant v. Essex Co., 74 U.S. (7 Wall.) 107, 113 (1868).

[40] *See* Inman v. Baltimore & O.R.R., 361 U.S. 138, 146 (1959) (dissenting opinion of Douglas, J.); Washington Bridge Co. v. Stewart, 44 (3 How.) 413, 424 (1845).

a single district court judge to cast the deciding vote for reversal of a conviction which the Supreme Court had affirmed.

As for the applicability of section 2244(c) to an equally divided decision of the Court, the res judicata principle of this section precludes federal habeas relief where the issues had been "actually adjudicated" in a prior judgment of the Court. Congress intended that the section include those dispositions of federal claims which were more than mere denials of certiorari.[41] If the statute's scope includes something more than a denial of certiorari, perhaps an equally divided decision after a full hearing can reasonably be regarded as an actual adjudication, or at least operating as an adjudication upon the merits. An evenly split decision in this context certainly carries substantially more weight than a denial of certiorari.[42]

Because of the equally divided vote on appeal, the *Biggers* case presents a unique opportunity to probe the significance and applicability of section 2244(c),[43] which the court unfortunately failed to utilize. The typical federal habeas corpus proceeding occurs where the Supreme Court has not directly reviewed the state court judgment or where the review was denied, and hence section 2244(c) would not bar the habeas corpus proceeding. But where review is granted and there is an actual adjudication, section 2244(c) will clearly bar those issues adjudicated from being raised in a federal habeas corpus proceeding. Thus, the doctrine of res judicata embodied in this section will foreclose some collateral attacks by federal habeas corpus.[44]

The fact that the *Biggers* court was faced with a novel situation is underlined by its approach to the case. At one point in its reasoning, in justification of the district court's grant of habeas corpus, the court implicitly assumed that the Supreme Court's 4–4 vote to affirm was a decision on the merits.[45] In a subsequent line of reasoning, the court

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[41] *See* note 29 *supra*.

[42] A denial of certiorari only means that there were not at least four Justices who wanted to review the case. Brown v. Allen, 344 U.S. 443, 489–97 (1953); Maryland v. Baltimore Radio Show, 338 U.S. 912, 917 (1950) (opinion of Frankfurter, J.).

[43] In the only case construing section 2244(c), the court held that a dismissal of certiorari was not an "adjudication" within the meaning of the statute, but rather the equivalent of a denial of certiorari. Miller v. Carter, 434 F.2d 824 (9th Cir. 1970).

[44] Since the Supreme Court usually reviews only those facts presented in the state record, it would be advisable in light of section 2244(c) to avoid direct review by the Supreme Court where a factual issue had not been fully developed in the state record. The Supreme Court's review in this situation would preclude this issue from being considered in a subsequent petition for habeas corpus. For this reason, it would be advantageous for the state prisoner to first seek a writ of habeas corpus in the federal courts, which have the power to grant an evidentiary hearing to develop the inadequate trial record.

[45] The court in *Biggers* stated that the issues before the district court and the Supreme Court were different. Distinguishing the issues before the two courts is necessary only if the Supreme Court's affirmance was a decision on the merits.

argued that the equally divided decision was not an adjudication on the merits. These alternate rationales, which attempt to cover all possible contingencies raised by the situation, at the very least weaken the decision as authority for a similar case. Furthermore, the case's authoritative value is already undercut by the fact that the *Biggers* court completely overlooked the res judicata limitation of section 2244(c) as applied to federal habeas relief for state prisoners. While section 2244(c) does not cut a broad swath into the habeas jurisdiction of federal courts, it at least expresses a legislative intent to draw some boundaries. Its purpose was to provide a qualified principle of finality in criminal litigation. By ignoring this section, the court in *Biggers* failed to recognize any such limits to the federal courts' broad power of habeas jurisdiction over state judgments.

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and therefore had a conclusive effect on the issue decided. In other words, why distinguish the issues if the Supreme Court's affirmance meant nothing? Also, the discussion of the inapplicability of res judicata to federal habeas corpus is apparently directed at the Supreme Court's affirmance of the decision. Unless the affirmance was an actual adjudication, there would be no point in discussing the res judicata effect of the decision.